Ahmad Majmi bin Idris & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-05–458 OF 2010 AND A-05–473 OF 2010

ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA

12 FEBRUARY 2014

Evidence — Accomplice — Credibility — Whether application of presumption that accomplice was unworthy of credit unless corroborated in material particulars was within discretion of court — Section 114(b) of the Evidence Act 1950 — Whether trial court had audio-visual advantage to decide whether accomplice was credible and reliable — Whether accomplice's evidence corroborated by other independent evidence — Whether prosecution not bound to prove who among several assailants delivered death blow when all accused charged with having common intention to commit murder — Penal Code s 34

The High Court sentenced the appellants to death after finding them guilty of committing murder. The prosecution's evidence rested upon the testimony of an eye-witness, PW8, who was, in fact, an accomplice in the crime. PW8 told the trial court that he, the appellants and another person named Eddy originally only intended to commit robbery. Eddy was armed with a parang and the four of them first robbed a woman after which they robbed a security guard ('the deceased') of his car with him still in the vehicle. PW8 said while he followed on a motorcycle, the appellants and Eddy took the deceased to a housing estate where he was dragged out of the car and beaten until he fainted after which they bound him up with ropes, tied a stone slab to his chest and threw him into a mining pool. PW8 said when the deceased regained consciousness when he came into contact with the water, Eddy and the second appellant used the parang Eddy had brought to slash and stab the deceased several times before throwing him back into the pool. The pathologist ('PW10') testified that although there were several superficial stab and slash wounds on the deceased's body, which would not have caused death in ordinary circumstances, the injury that did cause the death was a stab wound to the right side of the neck. In their instant appeal against conviction and sentence, the appellants said (i) since most of the injuries on the deceased were superficial it was incumbent upon the trial court to have ascertained who actually caused the fatal blow to the deceased and (ii) it was unsafe for the convictions to stand

based upon PW8's evidence because he took an active part in the commission of the offence and was not a credible or reliable witness.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Under s 133 of the Evidence Act 1950 ('EA'), an accomplice was a competent witness against an accused and a conviction was not illegal merely because it proceeded upon an accomplice's uncorroborated testimony. Section 133 had to be read with s 114(b) of the EA under which the court might presume an accomplice unworthy of credit unless he was corroborated in material particulars. The s 114(b) presumption should not be applied automatically. The trial judge had discretion whether or not to apply the presumption. In this case, the trial judge found PW8 to be a credible and reliable witness. The issue of PW8's credibility was decided based upon the facts and circumstances of the case and the inherent probabilities of his testimony. As a trier of fact, the trial judge had the audio-visual advantage in coming to his finding (see paras 12, 14 & 15).

(2) There was more than sufficient admissible evidence to support the trial judge's acceptance of PW8's testimony which was corroborated by PW10's evidence about the type of injuries suffered by the deceased; PW14's testimony that Eddy and the appellants used the deceased's car when they visited him; and by the finding of the first appellant's fingerprints from an item in the deceased's car (see para 16).

(3) The argument that it was necessary to ascertain who actually caused the fatal blow to the deceased lacked merit. The appellants were charged with having common intention, under s 34 of the Penal Code ('Code'), to commit the murder. As s 34 was invoked, there was no requirement to prove who actually or ultimately caused the deceased's death. There was ample evidence that both the appellants and Eddy had the common intention to not only rob but also to kill the deceased. Even though the killing was not part of the original plan, they had afterwards formed the common intention to fatally injure him with the parang and actively participated in the killing (see paras 18 & 25).

(4) The trial judge correctly concluded that the act of the appellants and Eddy was murder within the meaning of s 300 of the Code. They had every chance of escaping without the need to hurt the deceased if their intention was merely to rob. On realising the deceased was not yet dead from their beatings Eddy and the first appellant attacked the deceased with a parang. The stab wounds showed application of great force and intention to do great harm. The attack on the deceased was unprovoked, cruel and savage (see paras 21 & 22).

[Bahasa Malaysia summary

Mahkamah Tinggi menjatuhkan hukuman mati ke atas perayu-perayu setelah didapati bersalah melakukan pembunuhan. Keterangan pendakwaan terletak pada keterangan saksi, PW8, yang sebenarnya merupakan seorang rakan sejenayah dalam jenayah itu. PW8 memberitahu mahkamah perbicaraan bahawa dia, perayu-perayu dan seorang lain bernama Eddy pada asalnya hanya bertujuan untuk melakukan rompakan. Eddy bersenjatakan sebilah parang dan empat daripada mereka terlebih dahulu merompak seorang wanita keneudian mereka merompak seorang pengawal keselamatan ('si mati') kereta dengan si mati masih berada di dalam kenderaan itu. PW8 berkata sewaktu dia mengekori kenderaan tersebut dengan menaiki motosikal, perayu-perayu dan Eddy membawa si mati ke kawasan perumahan di mana dia telah diheret keluar dari kereta dan dipukul sehingga dia pengsan selepas itu mereka membelenggu si mati dengan tali, mengikat sebongkah batu di dadanya dan melemparkannya ke dalam lombong. PW8 berkata apabila si mati kembali sedar apabila dia terkena air, Eddy dan perayu kedua menggunakan parang yang telah dibawa oleh Eddy mengelar dan menikam si mati beberapa kali sebelum mencampakkan si mati kembali ke dalam kolam. Ahli patologi ('PW10') memberi keterangan bahawa walaupun terdapat beberapa tikaman minor dan kelaran luka-luka di badan si mati, yang tidak akan menyebabkan kematian dalam keadaan biasa, kecederaan yang menyebabkan kematian adalah luka tikaman di sebelah kanan leher. Dalam rayuan ini mereka terhadap sabitan dan hukuman perayu-perayu berkata (i) memandangkan kebanyakan kecederaan pada si mati adalah minor ia adalah penting bagi mahkamah perbicaraan untuk menentukan siapa sebenarnya menyebabkan pukulan maut kepada si mati dan (ii) ia adalah tidak selamat untuk sabitan dipertahankan berdasarkan keterangan PW8 kerana dia telah terlibat secara aktif dalam melakukan kesalahan itu dan merupakan saksi yang tidak boleh dipercayai atau boleh diharap.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Di bawah s 133 Akta Keterangan 1950 ('AK'), seorang rakan sejenayah ialah saksi kompeten terhadap tertuduh dan sabitan tidak menyalahi undang-undang semata-mata kerana ia dikemukakan atas keterangan yang tidak menyokong rakan sejenayah. Seksyen 133 terpaksa dibaca dengan s 114(b) AK yang mana mahkamah mungkin menganggap rakan sejenayah tidak boleh diterima melainkan dia disokong oleh butir-butir material. Anggapan s 114(b) tidak boleh diguna pakai secara automatik. Hakim perbicaraan mempunyai budi bicara sama ada untuk atau tidak mengguna pakai anggapan. Dalam kes ini, hakim perbicaraan mendapati PW8 adalah saksi yang boleh dipercayai dan boleh diharap. Isu kredibiliti PW8 telah diputuskan berdasarkan fakta-fakta dan hal keadaan kes itu dan kebarangkalian inherens keterangannya. Sebagai pencuba fakta,

hakim perbicaraan mempunyai kelebihan secara audio visual untuk membuat dapatannya (lihat perenggan 12, 14 & 15).

(2) Terdapat lebih daripada keterangan boleh terima yang mencukupi untuk menyokong penerimaan hakim perbicaraan terhadap keterangan PW8 yang mana disokong oleh bukti PW10 tentang jenis kecederaan yang dialami oleh si mati; keterangan PW14 bahawa Eddy dan perayu-perayu menggunakan kereta si mati apabila mereka menyerang si mati; serta dapatan cap jari perayu pertama dari item dalam kereta si mati (lihat perenggan 16).

(3) Hujah bahawa adalah perlu untuk menentukan siapa yang sebenarnya menyebabkan pukulan maut kepada si mati tidak mempunyai merit. Perayu-perayu telah dituduh dengan mempunyai niat bersama, di bawah s 34 Kanun Keseksaan ('Kanun'), untuk melakukan pembunuhan itu. Memandangkan s 34 telah dibangkitkan, tidak ada keperluan untuk membuktikan siapa sebenarnya atau pada akhirnya menyebabkan kematian si mati. Terdapat bukti bahawa kedua-dua perayu dan Eddy mempunyai niat bersama untuk bukan sahaja merompak tetapi juga untuk membunuh si mati. Walaupun pembunuhan itu bukan merupakan sebahagian daripada rancangan asal, namun selepas itu mereka telah membentuk niat bersama untuk mencederakan si mati sehingga menyebabkan kematian dengan parang dan mereka terlibat secara aktif dalam pembunuhan itu (lihat perenggan 18 & 25).

(4) Hakim perbicaraan dengan betul membuat kesimpulan bahawa tindakan perayu-perayu dan Eddy adalah dalam maksud pembunuhan s 300 Kanun. Mereka mempunyai setiap peluang melepaskan diri tanpa perlu menyakiti si mati jika niat mereka adalah semata-mata untuk merompak. Apabila menyedari si mati masih belum mati dari pukulan mereka Eddy dan perayu pertama menyerang si mati dengan sebilah parang. Luka tikaman menunjukkan hentaman yang sangat kuat dengan niat untuk menyebabkan kecederaaan parah. Serangan terhadap si mati adalah tanpa provokasi, zalim dan kejam (lihat perenggan 21 & 22).]

Notes

For cases on credibility, see 7 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 47–51.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Attan bin Abdul Gani v PP [1970] 2 MLJ 143b (refd)

DPP v Kilbourne [1973] AC 729, HL (refd)

Davies v DPP [1954] 1 All ER 507, HL (refd)

Mahbub Shah v King-Emperor AIR 1945 PC 118 (refd)

Ong Chee Hoe & Anor v PP [1999] 4 SLR 688, CA (refd)
PP v Haji Ismail & Another [1940] MLJ 76 (refd)
PP v Neoh Bean Chye & Anor [1975] 1 MLJ 3 (refd)
Rajwant Singh AIR 1966 SC 1874 (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497; [1999] 4 CLJ 215, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401, SC (refd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219, FC (refd)

Legislation referred to

Evidence Act 1950 ss 114(b), 133
Penal Code ss 34, 300, 300(c), (d), 302

Appeal from: Criminal Trial Nos 45–19 of 2007 and 45–20 of 2007 (High Court, Ipoh)

Darshan Singh Gill (Gill & Co) for the first appellant.
K Viknesvaran (Ratna & Co) for the second appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] Ahmad Majmi bin Idris ('the first appellant') and Hibatul Kasyidi bin Dzulkifli ('the second appellant') were jointly charged and tried in the High Court at Ipoh for committing an offence under s 302 of the Penal Code ('the Code') read with s 34 of the Code for murdering one Mohamad Fauzi bin Ramli (' the deceased').

[2] This is a case which started as a robbery but ended with the death of the deceased. According to the prosecution, both the appellants and another person who is still at large, between 5 June 2006 and 10.15pm on 7 June 2006, at a mining pool in Taman Seri Raia, Kg Kepayang, Ipoh in the District of Kinta, Perak, in furtherance of their common intention committed murder by causing the death of the deceased, an offence punishable under s 302 read with s 34 of the Code.

[3] The learned judicial commissioner ('JC') at the conclusion of the trial found both the appellants guilty and convicted them of the charge. They were then sentenced to the mandatory death penalty prescribed by the Code. The appellants then appealed to this court. We heard their appeal, wherein at its conclusion we unanimously dismissed it. We affirmed the convictions and sentences of death imposed by the learned JC upon both the appellants. We now give the reasons for our decision.

[4] Before we allude to the factual matrix of the case, we think it is appropriate to mention at the outset that Muhammad Fadzli bin Sulaiman ('PW8') was the most important witness for the prosecution. PW8 gave an eye witness account of the appalling incident. It was based on his evidence in its crucial details that the learned JC was satisfied that the prosecution had proved the case against both the appellants beyond reasonable doubt.

[5] PW8 had known the second appellant since he was 16 years old. It was sometime in June 2006 that he together with the second appellant went to Ipoh town to steal a motorcycle. After succeeding to do so, they returned to the house of the second appellant. They were subsequently joined by the first appellant and his friend by the name of Eddy. Together, they hatched a plan to commit robbery. All of them then left for town on two motorcycles (one of which was the stolen motorcycle) to pursue their plan. According to PW8, Eddy took a parang with him from the second appellant's house. They went on to rob a woman at Ipoh Garden after which they proceeded to the vicinity of Planet Rock where they robbed the deceased of his car, a white-coloured Proton with the deceased inside. The deceased worked as a security guard at Planet Rock. PW8 saw all these from a side lane of Planet Rock.

[6] PW8 then left the scene by riding the motorcycle belonging to the first appellant. He followed and met the others at a traffic light intersection in the Ipoh Garden area. After that he saw the second appellant driving the car while Eddy, the first appellant and the deceased were seated behind with the deceased in the middle.

[7] On reaching the house of the second appellant, PW8 followed and sat in the car. They drove around Buntong, Tasek and Kg Chepor before arriving at a housing development area in Taman Meru where the deceased was taken out from the car and they proceeded to beat him up. The second appellant used a crash-helmet while the rest used their hands.

[8] After the deceased had fainted, he was tied up with ropes which were taken from a nearby shop by PW8 and the first appellant. His hands were tied to his back while his legs were put into a gunny sack which was also tied up. A stone slab was tied to the chest of the deceased who was then placed on the floorboard at the back of the car. Later they dumped the deceased into a mine at Simpang Pulai at the suggestion of the first appellant. The four of them pulled the deceased from the car and Eddy together with the first appellant dragged the body to the side of the mining pool before throwing it in.

[9] The deceased struggled after regaining consciousness on touching water and that was when PW8 said that Eddy told the second appellant to get the parang from the car. Eddy then used the parang to strike at and slash the

deceased's head and body. The first appellant also did the same with the parang. When the deceased stopped moving, Eddy kicked the deceased into the deeper section of the mining pool.

[10] On 7 June 2006 at about 10.15pm, L/Kpl Nor Azila bt Azami ('PW2') received a telephone call informing her of a corpse (later identified as the deceased) floating in a mining pool in the area of Taman Seri Raia, Kg Kepayang, Ipoh.

[11] From what has been outlined above, it cannot be disputed that PW8 was an accomplice of both the appellants and Eddy to the crime. In truth, PW8 was a participant in the offence (see *Davies v DPP* [1954] 1 All ER 507). It is against this backdrop, both learned counsel for the appellants had argued before us that the learned JC misdirected herself when she did not appreciate that it was wholly unsafe to convict the appellants based on the accomplice evidence. It was argued that the accomplice evidence to be untrustworthy as he took active role in the commission of the offence and therefore all his evidence should be taken with great caution. According to learned counsel, the evidence of PW8 could not be corroborated because he was not a credible or reliable witness.

[12] The law on the evidence of an accomplice is contained in ss 133 and 114(b) of the Evidence Act 1950 ('the EA'). Section 133 of the EA declares that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. This provision must be read with s 114(b) of the EA which stipulates that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. However, the presumption under s 114 (b) should not be applied automatically. The trial judge has a discretion whether to apply or not the presumption. On the applicability of the presumption, Cussen J in *Public Prosecutor v Haji Ismail & Another* [1940] MLJ 76 said:

> There is no question of the mechanical application of any general rule of presumption. When it is a question of this particular presumption, the credibility of the witness who is in the position of an accomplice must be individually judged just as any other witness, the same considerations being applied, with the added one that he is an accomplice. The court must consider who and what he is, his demeanour, bearing, the manner and quality and substance of his evidence in itself and in relation to all the circumstances of the case. The nature, quality and degree of his complicity must be examined. Then finally the court must form its opinion whether he is to be given credit and his evidence accepted without corroboration or not.

[13] Coming back to the present case, the learned JC appreciated that the prosecution relied wholly on the evidence PW8. In her judgment, the learned

JC emphasised that it was through the accomplice evidence that made out the complicity of both, the appellants and Eddy in the death of the deceased. In her judgment, this is what the learned JC said:

> Nonetheless, the evidence of an accomplice must be credible and corroborated. Corroboration is peculiar to an accomplice while credibility applies to all witnesses.

[14] After a careful analysis of the entire evidence, the learned JC concluded that PW8 was a credible and reliable witness:

> In the instant case, I heard, observed and evaluated SP8's testimony which I found not only credible on the whole but also sufficiently corroborated by what SP14 had to say subsequent to the crime. SP8's evidence was not self-exculpatory. He was able to describe concisely and in detail about what transpired right down to his specific identification of the four pieces of rope (P11 (A-D)) which he unhesitatingly said were used to tie up the victim by the colour and on his admission he was the one who cut the ropes.

Furthermore, the learned JC had this to say in appraising PW8's evidence:

> It was clear from SP8's testimony that he did not try to exculpate himself. It was noted too that cross-examination of SP8 failed to dislodge his consistent description of what happened. He emphatically disagreed with the suggestion of learned counsel for the second Appellant that his testimony was untrue and he was coached by the police. SP8's crucial account of what took place largely remained unshaken when he was cross-examined.

[15] In our judgment, the issue of the credibility of PW8 was decided wholly on the facts and the prevailing circumstances of the case, based on the inherent probabilities of his testimony. In this regard we have to remind ourselves that as a trier of fact, the learned JC had the audio visual advantage reserved to a trial judge.

[16] On the facts of the present case, there was more than sufficient admissible evidence to support the findings of the learned JC in accepting the evidence of PW8. In our judgment, the evidence of PW8 fits in with the corroborative evidence present in this case, which tends to show through the testimony of PW8 that both the appellants and Eddy committed the murder is true (see *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401, *DPP v Kilbourne* [1973] AC 729 and *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143). First, we refer to the evidence of Dr Bhupinder Singh ('PW10') who conducted the post-mortem examination on the deceased. PW10 confirmed there were numerous stab and slash wounds found on the deceased. These injuries were consistent with and corroborated what PW8 had testified with regard to what he had witnessed at the mining pool. PW10 was of the opinion that the stab and slash wounds could have been

caused by a sharp-pointed weapon. This corroborated PW8's evidence as to the use of parang by Eddy and the first appellant to injure the deceased. Secondly, PW8's evidence was also corroborated by what Wan Sabarudin bin Wan Hassan ('PW14') had to say subsequent to the crime. PW14 confirmed that Eddy and both the appellants had used the deceased's car when they visited him in Kuala Lumpur. And thirdly, Detective Sergeant Ibrahim bin Omar ('PW12') managed to lift seven finger-prints from the deceased's car, exhs P40 (C1-C7). The assistant registrar of criminals, Ngsman bin Haji Saring ('PW11') found the left thumb impression of 'C5' (lifted from the 100 plus bottle from the rear floorboard of the car) to be similar to the left thumb impression of the first appellant.

[17] We turn next to the ground raised by learned counsel for the first appellant that the learned JC had erred in convicting the first accused for murder 'when there is absolutely no evidence to affirm that it was the first appellant who killed the deceased'. Learned counsel brought to our attention the evidence of PW10 who found that the cause of death was as a result of a stab wound to the right side of the neck. PW10 also testified that most of the injuries sustained were quite superficial in nature which would not have caused death in ordinary circumstances. Therefore, learned counsel argued that 'what is most pertinent in this case is to ascertain who actually caused the fatal blow that killed the deceased as most of the injuries were only superficial in nature'.

[18] We found the submission of learned counsel lacked merit. For the proper determination of this issue, it is important to bear in mind that both the appellants together with another person still at large were charged for the common intention under s 34 of the Code of murdering the deceased. Section 34 provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. In our judgment, when s 34 of the Code is invoked, there is no requirement to prove who actually or ultimately caused the death of the deceased as was held in *Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688:

> In any case, the effect of invoking section 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v Emperor* AIR [1925] PC 1, the court stated:
>
> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[19] In relation to this, the learned JC after carefully reviewing the entire evidence made specific findings concerning this issue:

> Whether it was Eddy or the first accused who struck the eventual deadly blow and caused the death by that single stab wound based on SPIO's finding was immaterial. They together with the second accused had robbed the deceased of his car besides abducting him. They had their own senseless reason to kill the deceased by the manner they treated the deceased culminating with the fatal stab wound at the mining pool.
>
> The Federal Court decision in *Public Prosecutor v Teong Lung Chiong & Ors.* [2010] 4 CLJ 1 is in point in this regard on the settled law on common intention when it held:
>
> (5) As for issue (3) it would appear that the Court of Appeal was looking for a direct link to who actually among the respondents committed the act or acts of killing the deceased. The Court of Appeal seemed to be quite oblivious of the fact that the respondents were jointly charged with s 34 of the Code invoked, which was an approach not quite in tandem with the settled law. With s 34 of the Code invoked, there was no requirement for the prosecution to prove who exactly ultimately caused the deceased's death. *Ong Chee Hoe v Public Prosecutor*

[20] We are of the view that there has been no misdirection by the learned JC on this aspect of the law and on this finding of fact. It is important to point out that common intention is usually inferred from the facts and circumstances of a particular case and from the conduct of the parties (see *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336). In *Mahbub Shah v King-Emperor* AIR 1945 PC 118, the Privy Council said:

> It is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

[21] In our view, on the facts and the surrounding circumstances of this case, the learned JC had correctly concluded that the act of the appellants and Eddy is murder within the meaning of s 300(d) of the Code, which provides that all unlawful killings are murder if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In the case of *Rajwant Singh* AIR 1966 SC 1874, Hidayatuilah J explained this provision in the following words:

> The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

> In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not. As was laid down in *Virsa Singh v State of Punjab,* 1958 SCR 1495: (AIR 1958 SC 465) for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender, the offence of murder is established.

[22] In the present case, PW8 saw how both the appellants and Eddy had ambushed the deceased and robbed him of his car. They had every chance of escaping without the need to hurt the deceased any further if their intention was merely to rob. But the deceased was tied up with a nylon string around his feet and he was then put into a gunny sack. The deceased was also tied up with a nylon string around his neck which was later tied to a stone slab which was positioned on the deceased's chest. At Kampung Kepayang, PW8 saw how the deceased was thrown into a disused mining pool. Upon realising that the deceased was not dead yet, Eddy attacked the deceased with a parang and the first appellant did the same. The deliberate use of the parang which is a dangerous weapon leads to the irresistible inference of an intention to cause death (see *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497; [1999] 4 CLJ 215 and *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174). PW10 confirmed that there were multiple slash and incised wounds mostly on the head and upper torso of the deceased. The stab wounds in particular, were deep indicating application of great force and an intention to do great harm. PW10 was of the opinion that injuries in the region of the neck had cut the major blood vessels resulting in haemorrhage. These injuries would have been fatal in nature. There was no sudden fight. The deceased had never provoked both the appellants and Eddy. In our judgment, this unprovoked cruel and savage act is murder within the meaning of s 300(c) of the Code.

[23] We will now consider whether the appellants and Eddy have acted with a common intention to kill the deceased as their initial plan was to rob. In *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219, Ong CJ in delivering the judgment of the Federal Court said:

> In this case, the first appellant's involvement in the robbery was admitted by him in his own statement from the dock. On this point, corroboration by the second appellant was superfluous. As to the proof of common intention their joint involvement in a carefully planned robbery must lead irresistibly, from the fact of two of the trio being armed with lethal weapons, as to the inference of the common intention to use those weapons in case of need.

[24] In *Public Prosecutor v Neoh Bean Chye & Anor* [1975] 1 MLJ 3 it was held:

> In a criminal prosecution where section 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For section 34 to apply, it is sufficient if the prosecution proved that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

[25] Coming back to the present case, in our view, there is ample evidence as found by the learned JC, with which we agree, that both the appellants and Eddy had the common intention not only to rob but also to kill the deceased. It is in evidence that Eddy was at the material time armed with a parang, which lead to the compelling inference of the common intention to use the weapon in case of need, which was in fact the case. Even though killing the deceased was not part of the original plan, they had afterwards actively participated in the unlawful killing of the deceased. They had a common intention to cause the fatal injury to the deceased with the parang; both the appellants and Eddy must be held jointly liable for the offence of murder.

[26] We were satisfied that the learned JC had not misdirected himself in any way to occasion an error either on the law or the facts to warrant appellate interference. We were unanimous that the learned JC had not made any wrong inferences on the facts before him. The convictions of the appellants were safe. We found no merits in this appeal. We accordingly dismissed the appeal and affirmed the convictions and sentences.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar